**NO. 83377-0**

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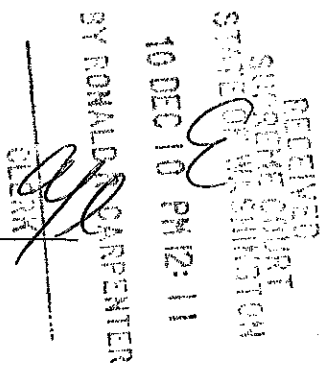
**SUPREME COURT OF THE**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

HARRY CARRIER, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Judge Name

No. 04-1-03722-2

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**SUPPLEMENTAL BREIF**

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MARK LINDQUIST
Prosecuting Attorney

By
MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court dismiss this petition where petitioner's judgment and sentence was final more than a year ago and petitioner's judgment and sentence is valid on its face?

B. STATEMENT OF THE CASE.

Petitioner, Harry Carrier, is restrained pursuant to a judgment and sentence entered in Pierce County Cause No. 04-1-03722-2. Appendix A of State's Response. On June 15, 2005, petitioner pled guilty to first degree child molestation, dealing in depictions of minors engaged in sexually explicit conduct, and possession of depictions of minors engaged in sexually explicit conduct. *Id.* At the sentencing hearing on February 10, 2006, the court found that petitioner's 1981 conviction for indecent liberties was comparable to a first degree child molestation conviction. *Id.* at Sec. 4.2. This finding has never been challenged on appeal. The court sentenced petitioner to life in prison as a persistent offender on the first degree child molestation count, sixty months on the dealing in depictions of minors engaged in sexually explicit conduct, and 12 months on possession of depictions of minors engaged in sexually explicit conduct. *Id.*

Petitioner filed a direct appeal challenging the court's denial of his motion to withdraw his guilty plea and also alleging ineffective assistance

of counsel. Appendix A. The court affirmed his convictions. *Id.* The mandate issued on July 6, 2007. *Id.*

Petitioner filed this personal restraint petition over two years later on July 22, 2009. This appears to be petitioner's first personal restraint petition.

The petition was originally dismissed by the commissioner of this court on March 26, 2010. The commissioner dismissed the petition as petitioner had not shown that his judgment and sentence was facially invalid.

This court granted defendant's motion to modify the commissioner's decision. This case is now set for argument before this court.

C. ARGUMENT.

1. AS DEFENDANT HAS NOT SHOWN THAT HIS JUDGMENT AND SENTENCE IS FACIALLY INVALID AND CANNOT SHOW AN EXCEPTION TO THE ONE YEAR TIME BAR.

a. Defendant cannot show that his judgment and sentence is facially invalid.

Personal restraint procedure came from the State's habeas corpus remedy, which is guaranteed by article 4, § 4 of the State Constitution. ***In re Hagler***, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Collateral attack by personal restraint petition is not, however, a substitute for direct appeal. *Id.* at 824. "[C]ollateral relief undermines the principles of finality of

litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *Id.* (*citing* ***Engle v. Issac***, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. ***Hagler***, 97 Wn.2d at 824.

Because of the costs and risks involved, there is a time limit in which to file a collateral attack. RCW 10.73.090(1) subjects petitions to a one-year statute of limitation. The statute provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1). The statue of limitations set forth in RCW 10.73.090(1) is a mandatory rule that bars appellate consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition falls within an exemption to the time limit under RCW 10.73.090 (facial invalidity or lack of jurisdiction) or is based solely on one or more of the following grounds:

> (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
> (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the State Constitution;
(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
(5) The sentence imposed was in excess of the court's jurisdiction; or
(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

The petitioner bears the burden of proving that his petition falls within an exception to the one year bar. ***Shumway v. Payne***, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998). To meet that burden of proof, the petitioner must state the applicable exception within the petition. ***Shumway v. Payne***, 136 Wn.2d at 399-400. Neither the Supreme Court nor the Court of Appeals may grant relief on a petition that is time barred. *See* RAP 16.4(d).

A petitioner asserting a constitutional violation must show actual and substantial prejudice. ***In re Haverty***, 101 Wn.2d 498, 681 P.2d 835 (1984). A petitioner relying on non-constitutional arguments, however,

must demonstrate a fundamental defect that inherently results in a complete miscarriage of justice. ***In re Cook***, 114 Wn.2d 802, 810-11, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. ***In re Cook***, at 810.

In the present case, petitioner's judgment and sentence became final on July 6, 2007, the date the appellate court issued its mandate disposing of petitioner's direct appeal. *See* RCW 10.73.090(3)(b). Petitioner's personal restraint petition was not filed until July 22, 2009, more than two years after his judgment and sentence became final. Petitioner claims that that one year time bar does not apply and alleges that his judgment and sentence is facially invalid because his 1981 indecent liberties conviction was included in his offender score. Petitioner's claim fails because there is nothing on the face of the judgment and sentence to support defendant's claim that his 1981 indecent liberties conviction was dismissed pursuant to RCW 9.95.240 or that such a dismissal is the same as being vacated. Further, if this court looks beyond the four corners of the judgment and sentence, petitioner's charge was never vacated and could not be vacated under the law at the time, and therefore the sentencing court properly included it when calculating petitioner's offender score.

b. Under RCW 9.95.240, dismissal and vacation are two separate processes and one does not automatically follow the other.

Petitioner argues that dismissal of a pre-SRA conviction under RCW 9.95.240 is equivalent to vacating a conviction under RCW 9.94A.640. A dismissal of a conviction and a vacation are not the same thing. Black's Law Dictionary defines dismissal as "termination of an action or claim without further hearing." BLACK'S LAW DICTIONARY, 502 (Bryan Garner ed., 8th Ed. 2004). It defines vacate as, "To nullify or cancel; make void, invalidate." *Id.* at 1584. Defendant relies on ***State v. Breazeale,*** 144 Wn.2d 829, 31 P.3d 1155 (2001) to support his claim that this two different legal concepts are the same thing. Contrary to petitioner's position, ***Breazeale*** does not hold that a dismissal under RCW 9.95.240 is the equivalent to a vacate under RCW 9.94A.640. Instead, ***Breazeale*** holds that after a defendant has his conviction dismissed under RCW 9.95.240, the defendant can also petition to have his conviction vacated under the same statute. The court in ***Breazeale*** stated, "We hold that a superior court has the statutory authority under RCW 9.95.240 to grant a petition to vacate the conviction record following dismissal of the charge under the same statute." 144 Wn.2d at 838. The plain language of the court's holding indicates that while the court had authority to grant a vacation, the vacation process is done

separately from the dismissal of a charge. The court also noted "[w]ithout the ability to petition the court to ***also*** vacate the conviction record and compel the Patrol to restrict public access to those records, the entitlement provided by [RCW 9.95.240] and intended by the Legislature is rendered meaningless." *Id.* at 838 (emphasis added). This issue was also addressed in ***State v. Ford***, 87 Wn. App. 794, 942 P.2d 1064 (1997), *reversed on other grounds*, 127 Wn.2d 472, 973 P.2d 452 (1999). The court in ***Ford*** found that a prior conviction could be part of an offender's criminal history unless it had been vacated and that a case subject to dismissal does not exclude the crime from a defendant's criminal history. 87 Wn. App. at 799-800. Vacation and dismissal are not the same thing.

In fact, two years after ***Breazeale*** was decided, the legislature amended RCW 9.95.240 to clarify that the rules regarding vacating a conviction apply identically to both pre- and post-SRA convictions. The 2003 amendment stated in the relevant part:

> (2)(a) After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under RCW 9.94A.640. The court may, in its discretion, clear the record of conviction if it finds the defendant has met the equivalent of the tests in RCW 9.94A.640(2) as those tests would be applied to a person convicted of a crime committed before July 1, 1984.
> (b) The clerk of the court in which the vacation order is entered shall immediately transmit the order vacating the conviction to the Washington state patrol identification

> section and to the local police agency, if any, which holds criminal history information for the person who is the subject of the conviction. The Washington state patrol and any such local police agency shall immediately update their records to reflect the vacation of the conviction, and shall transmit the order vacating the conviction to the federal bureau of investigation. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.

RCW 9.95.240(2). Both ***Breazeale*** and subsection (2) make clear that a dismissal under RCW 9.95.240(1) is not the equivalent of a vacate under RCW 9.94A.640, because the additional step of petitioning the court to vacate the conviction is required under both statue and case law.

In the present case, like ***Breazeale***, petitioner has a pre-SRA conviction that was dismissed pursuant to RCW 9.95.240. *See* Brief of Petitioner, Appendix B. However, unlike ***Breazeale***, petitioner never made a motion to vacate his conviction under that statute or RCW 9.94A.640. Also, unlike the defendants in ***Breazeale***, petitioner would not have been eligible to have his 1981 conviction for indecent liberties vacated even if he had made such a motion. In ***Breazeale***, the court noted that had the defendants been convicted of their respective felonies after

July 1, 1984, they would have been eligible for vacation under then RCW 9.94A.230[1]. Such is not the case for petitioner as will be explained below.

Petitioner's argument that ***Breazeale*** holds that a dismissal under RCW 9.95.240 is the equivalent of a vacate under RCW 9.94A.640 is without merit. ***Breazeale*** merely holds that a defendant whose pre-SRA conviction has been dismissed under RCW 9.95.240 shall have the same opportunity to petition the court to vacate his conviction as a defendant whose conviction was obtained post-SRA, and could petition the court to vacate under RCW 9.94A.640. This court should dismiss petitioner's petition.

c. Defendant's 1981 conviction for indecent liberties can not be vacated under either RCW 9.94A.640 or 9.95.240 and was properly included as part of defendant's offender score.

Petitioner's claim should be dismissed because neither RCW 9.95.240 nor 9.94A.640 permit the vacation of an indecent liberties conviction. An offender must be sentenced based upon the law in effect at the time the current offense was committed. RCW 9.94A.345. Petitioner committed the first degree child molestation at issue in this case between June and July of 2004. Therefore, the laws in effect during that time control petitioner's sentencing in this case.

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[1] Currently 9.94A.640.

In 2004, RCW 9.94A.640[2] stated in the pertinent part:

(1) Every offender who has been discharged under RCW 9.94A.637 may apply to the sentencing court for a vacation of the offender's record of conviction. **If the court finds the offender meets the tests prescribed in subsection (2) of this section, the court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty** and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.

(2) **An offender may not have the record of conviction cleared if...the offense was a crime against persons as defined in RCW 43.43.830...**

(3) Once the court vacates a record of conviction under subsection (1) of this section, the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

In 2004, RCW 9.95.240 read as follows:

(1) Every defendant who has fulfilled the conditions of his or her probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he or she has been convicted be permitted

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[2] In 2001 former RCW 9.94A.230 was recodified as 9.94A.640.

in the discretion of the court to withdraw his or her plea of guilty and enter a plea of not guilty, or if he or she has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he or she has been convicted. The probationer shall be informed of this right in his or her probation papers: PROVIDED, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

**(2)(a) After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under RCW 9.94A.640. The court may, in its discretion, clear the record of conviction if it finds the defendant has met the equivalent of the tests in RCW 9.94A.640(2) as those tests would be applied to a person convicted of a crime committed before July 1, 1984.**

(b) The clerk of the court in which the vacation order is entered shall immediately transmit the order vacating the conviction to the Washington state patrol identification section and to the local police agency, if any, which holds criminal history information for the person who is the subject of the conviction. The Washington state patrol and any such local police agency shall immediately update their records to reflect the vacation of the conviction, and shall transmit the order vacating the conviction to the federal bureau of investigation. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.

(emphasis added)

Neither RCW 9.94A.640 nor 9.95.240 allows a defendant to vacate a conviction if it was considered a crime against persons as defined in RCW 43.43.830[3]. Petitioner's conviction for indecent liberties is a crime against persons as defined in RCW 43.43.830, and RCW 9.94A.640(2) and therefore petitioner's charge cannot be vacated.

Petitioner's case is similar to ***State v. Moore***, 75 Wn. App. 166, 876 P.2d 959 (1994). In ***Moore***, the court addressed a situation similar to petitioner's in light of the enactment of the SRA. The defendant in ***Moore*** was convicted of attempted indecent liberties in 1980, and received a deferred sentence. After completing his probation, he was allowed to change his plea to not guilty under RCW 9.95.240, and the charge was dismissed. ***Moore***, 75 Wn. App. at 169. Years later, Moore plead guilty to a third degree assault charge, believing that his 1980 attempted indecent

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[3] RCW 43.43.830(5) states: "Crime against children or other persons" means a conviction of any of the following offenses: Aggravated murder; first or second degree murder; first or second degree kidnapping; first, second, or third degree assault; first, second, or third degree assault of a child; first, second, or third degree rape; first, second, or third degree rape of a child; first or second degree robbery; first degree arson; first degree burglary; first or second degree manslaughter; first or second degree extortion; **indecent liberties;** incest; vehicular homicide; first degree promoting prostitution; communication with a minor; unlawful imprisonment; simple assault; sexual exploitation of minors; first or second degree criminal mistreatment; endangerment with a controlled substance; child abuse or neglect as defined in RCW 26.44.020; first or second degree custodial interference; first or second degree custodial sexual misconduct; malicious harassment; **first, second, or third degree child molestation**; first or second degree sexual misconduct with a minor; *patronizing a juvenile prostitute; child abandonment; promoting pornography; selling or distributing erotic material to a minor; custodial assault; violation of child abuse restraining order; child buying or selling; prostitution; felony indecent exposure; criminal abandonment; or any of these crimes as they may be renamed in the future. (emphasis added)

liberties conviction would not count as part of his offender score because it had been dismissed. *Id.* at 168-69. The trial court disagreed, and Moore's attempted indecent liberties conviction was included when the court calculated Moore's offender score. On appeal, Moore equated his 1980 dismissal under RCW 9.95.240 with a vacate under then RCW 9.94A.230(3)[4] The court rejected Moore's argument relying on ***State v. Wade,*** 44 Wn. App. 154, 160, 721 P.2d 977, *review denied*, 107 Wn.2d 1003 (1986)[5]and the plain language of RCW 9.95.240, which expressly permits the State to plead and prove the dismissed charge in a subsequent prosecution and it "shall have the same effect as if probation had not been granted, or the information or indictment dismissed." *Id.* at 171 *citing* RCW 9.95.240. The court also noted that Moore's conviction for indecent liberties was a crime against persons, and therefore Moore would have been unlikely to have been able to vacate his attempted indecent liberties conviction under RCW 9.94A.230. *Id.* at 170 n. 4.

Here, petitioner makes the exact same argument as was made in ***Moore***. He is asking this court to find that his 1985 dismissal under RCW 9.95.240 really vacated his 1981 indecent liberties conviction by analogizing the dismissal to a vacate under RCW 9.94A.640. Like ***Moore***

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[4] Currently RCW 9.94A.640.
[5] The court in ***Wade*** found that even though defendant's 1980 conviction for unlawful possession of a controlled substance was dismissed, it was preserved for use in subsequent prosecutions. ***Wade***, 44 Wn. App. at 160-61.

and ***Wade***, this Court should reject petitioner's argument because a dismissal pursuant to RCW 9.95.240 is not equivalent to a vacate under RCW 9.94A.640. Additionally, also like ***Moore***, petitioner would not have been able to vacate his conviction, because indecent liberties is a crime against persons, and RCW 9.94A.640 prohibits the vacation of crimes against persons.[6]

Both indecent liberties and first degree child molestation (to which the sentencing court found petitioner's indecent liberties conviction comparable) are considered crimes against persons. Thus, both RCW 9.94A.640(2)(c) and 9.95.240(2) prohibited petitioner from having his 1981 conviction for indecent liberties vacated.

Petitioner also relies upon RCW 9.94A.030(13)(b) to support his argument that petitioner's indecent liberties conviction should not be counted as part of his criminal history. RCW 9.94A.030(13)(b) states:

> A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

Petitioner's 1981 conviction was never vacated under any of the statutes

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[6] While petitioner makes no argument that his indecent liberties conviction should have washed, it should be noted that like ***Moore***, petitioner's sex offense can not wash and under RCW 9.94A.525(2)(a) will always be counted as part of petitioner's offender score. ***Moore***, 75 Wn. App. 166, 170 n 3; *see also* RCW 9.94A.030(46)(a)(i) and 9A.44.100 (indecent liberties is a felony within 9A.44).

listed in RCW 9.94A.030(13)(b). Petitioner's argument fails because his case was dismissed pursuant to 9.95.240, *not* vacated, and therefore RCW 9.94A.030(13)(b) provides no support to petitioner.

Petitioner's indecent liberties conviction was properly counted as part of his offender score, and his petition should be dismissed.

D. CONCLUSION.

Petitioner's petition should be dismissed because petitioner's judgment and sentence is facially valid as the trial court properly included petitioner's 1981 indecent liberties conviction as part of his criminal history when calculating petitioner's offender score.

DATED: December 10, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney

MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/10/10 J Johnson
Date Signature

# APPENDIX "A"

*Mandate/Court of Appeals Decision*




# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br>Respondent,<br><br>v.<br><br>HARRY N. CARRIER,<br>Appellant. | No. 34557-9-II<br><br>MANDATE<br><br>Pierce County Cause No.<br>04-1-03722-2 |

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on May 30, 2007 became the decision terminating review of this court of the above entitled case on July 2, 2007. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor Respondent State: $5.05
Judgment Creditor A.I.D.F.: $3,384.15
Judgment Debtor Appellant Carrier: $3,389.20

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 6th day of July, 2007.

Clerk of the Court of Appeals,
State of Washington, Div. II

Alicia Marie Burton
Pierce Co Dep Pros Atty
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2171

Hon. John A. McCarthy
Pierce Co Superior Court Judge
930 Tacoma Ave So.
Tacoma, WA 98402

Sheri Lynn Arnold
Attorney at Law
PO Box 7718
Tacoma, WA, 98417

Indeterminate Sentence Review Board

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>HARRY NATHAN CARRIER,<br><br>Appellant. | No. 34557-9-II<br><br><br><br><br>UNPUBLISHED OPINION |

HOUGHTON, C.J. -- Harry Carrier appeals his convictions of first degree child molestation and dealing in depictions of a minor engaged in sexually explicit conduct. He argues the trial court erred in denying his motion to withdraw his guilty pleas and that he received ineffective assistance of counsel. We affirm.

FACTS

On July 30, 2004, the State charged Carrier with one count of first degree rape of a child (count I), RCW 9A.44.073; one count of first degree child molestation (count II), RCW 9A.44.083; one count of sexual exploitation of a minor (count III), RCW 9.68.040(1)(b); one count of dealing in depictions of a minor engaged in sexually explicit conduct (count IV), RCW 9.68A.050(1); and one count of possession of depictions of a minor engaged in sexually explicit conduct (count V), former RCW 9.68A.070 (2004). The State filed a persistent offender notice, alleging in part that Carrier had a 1981 conviction of indecent liberties, which is a "most serious

offense" as defined by former RCW 9.94A.030(28) (2004). The State later filed an amended information changing count I from first degree rape of a child to another count of first degree child molestation.

During a pretrial CrR 3.5 hearing, Carrier entered a guilty plea on counts IV and V. The plea agreement Carrier signed stated that the standard range sentence for count IV was 60 months. The standard range for count IV had an asterisk next to it and the word "disputed" next to another asterisk, denoting that Carrier disputed whether his previous conviction of indecent liberties should be included in the calculation of his offender score. Clerk's Papers (CP) at 12.

The trial court asked Carrier a lengthy series of questions to ensure that the plea was voluntary and that he understood the consequences and the rights he waived by pleading guilty, including whether he understood the maximum sentence for count IV was 60 months of confinement. He pleaded guilty to counts IV and V after informing the court he (1) read the plea agreement, (2) was aware of his potential sentence of 60 months for count IV, and (3) would enter the plea voluntarily. The trial court accepted his pleas on counts IV and V.

The case proceeded to a jury trial on counts I, II, and III. After a recess in the trial, Carrier agreed to plead guilty to count I in exchange for the State dismissing counts II and III. The plea agreement he signed noted that the maximum sentence and the sentence the State planned to pursue was life imprisonment without the possibility of parole. The agreement also noted that he would dispute the maximum sentence, arguing he was not a persistent offender because his previous indecent liberties conviction was not comparable to first degree child molestation.

In Carrier's presence, his counsel told the trial court that he explained to Carrier that the State had filed a persistent offender notice and that there was a "distinct possibility that [Carrier]

could be sentenced to life in prison without release or parole." 3 Report of Proceedings (RP) at 231. Carrier also received and reviewed with his counsel a document that advised him of the persistent offender law.

The trial court again asked Carrier a lengthy series of questions to ensure his plea was voluntary and that he understood the consequences and the rights he waived by pleading guilty. He told the trial court he understood that there was a sentencing issue based on the classification of his indecent liberties conviction, which the trial court would ultimately decide. The trial court asked him if he understood he could receive a sentence of life imprisonment without the possibility of parole depending on the court's decision, and he said he understood. The trial court accepted his guilty plea, finding that he made it knowingly, intelligently, and voluntarily; dismissed counts II and III; and set a sentencing hearing date.

At Carrier's sentencing hearing, his counsel informed the trial court that Carrier wished to withdraw his guilty pleas. The trial court delayed sentencing and Carrier, represented by a new defense counsel, moved to withdraw his guilty pleas under CrR 4.2(f).

On February 10, 2006, the trial court held a hearing on Carrier's motion to withdraw his guilty pleas. Carrier and his original defense counsel testified at the hearing. Carrier testified that defense counsel informed him that the maximum sentence for count IV was 12 months and that he thought the plea agreement for count I noted the State would pursue a "lite" sentence, not a "life" sentence. RP (Feb. 10, 2006) at 30.

Carrier's original defense counsel said that he explained to Carrier the standard range for count IV was 60 months, told Carrier that if he pleaded guilty to count I or II he could receive a life sentence without parole, and that Carrier decided to plead guilty to count I because he did not "want to put the victim through the process any further." RP (Feb. 10, 2006) at 53. The trial

court found that there was a "serious credibility problem" with Carrier's testimony and denied his motion to withdraw his guilty pleas. RP (Feb. 10, 2006) at 69.

After the trial court denied the motion to withdraw Carrier's pleas, his new defense counsel argued that Carrier was not a persistent offender under former RCW 9.94A-.030(32)(b)(i)(A) (2004) because his indecent liberties conviction was not comparable to first degree child molestation, a "most serious" offense for purposes of the persistent offender law. The crux of Carrier's argument was that the trial court could not use his indecent liberties conviction to classify him as a persistent offender because nothing in his indecent liberties guilty plea indicated that the victim was not his spouse, despite the fact that the victim was his seven year old daughter. The trial court concluded that Carrier was a persistent offender because his 1981 indecent liberties conviction was comparable to a charge of first degree child molestation under the 2004 statute.

Based on the trial court's finding that Carrier was a persistent offender, it sentenced him to life imprisonment without the possibility of parole on count I, 60 months' confinement for count IV, and 12 months' confinement for count V, all to run concurrently. Carrier appeals.

## ANALYSIS

### MOTION TO WITHDRAW GUILTY PLEA

First, Carrier argues that the trial court abused its discretion in denying his motion to withdraw his guilty pleas for counts I and IV. He argues that he did not enter his pleas knowingly, voluntarily, or intelligently because he did not understand the sentencing repercussions of the pleas.

We review the denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it

bases its decision on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Carrier is entitled to withdraw his guilty pleas only if he establishes that "withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); *See State v. Taylor*, 83 Wn.2d 594, 596-97, 521 P.2d 699 (1974). Manifest injustice is "an injustice that is obvious, directly observable, overt, not obscure." *Taylor*, 83 Wn.2d at 596. An involuntary plea is an example of a manifest injustice. *Taylor*, 83 Wn.2d at 597. Many safeguards precede a plea of guilty, so the manifest injustice standard is demanding. *Taylor*, 83 Wn.2d at 596.

A defendant's signature on a plea agreement is "strong evidence" that it is voluntary. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Additionally, when the trial court judge has inquired into the voluntariness of the plea on the record, the presumption of voluntariness is "well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

Carrier argues he did not knowingly, voluntarily, or intelligently enter his guilty plea for either count I or count IV because he did not understand the potential sentences for either count. But he signed a plea agreement that clearly stated the standard sentencing range for count IV was 60 months and that the State "may recommend any sentence authorized by law, up to [the] statutory maximum."[1] CP at 14. He also signed a plea agreement for count I that showed the State recommended and intended to pursue a sentence of life without parole.

[1] Although Carrier testified his original defense counsel told him that the maximum standard range for count IV was 12 months, counsel testified that he explained to Carrier the standard range for count IV was 60 months. The trial court did not find Carrier's testimony credible, and we will not disturb the trial court's credibility ruling. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Although he disputed the recommended sentences on both plea agreements, both agreements sufficiently informed him of the maximum possible sentence he could receive if he pleaded guilty to either count. *See, e.g., State v. Christen*, 116 Wn. App. 827, 832, 67 P.3d 1157 (2003) (when entering plea, defendant informed that his standard range could go up or down based on additional criminal history, so he assumed this risk and could not later withdraw his plea).

Additionally, the trial court engaged in a colloquy with Carrier when he entered both pleas. When the trial court inquired about whether he entered his plea for count IV voluntarily, he told the court he (1) understood the standard range sentence to be 60 months, (2) read and understood the plea agreement, and (3) entered his plea voluntarily.

The trial court also inquired if Carrier entered his plea for count I voluntarily and if he understood the State's sentencing recommendation and the possibility of receiving a life sentence without parole for the charge. Carrier told the court that he (1) had read the plea agreement for count I with his counsel, (2) understood the plea agreement, (3) understood the possibility of receiving a life sentence without the possibility of parole, and (4) voluntarily pleaded guilty. The trial court acknowledged that Carrier disputed his standard range sentence on both counts based on the classification of his previous indecent liberties conviction, and it sufficiently informed him of a guilty plea's sentencing repercussions for either count. Accordingly, Carrier's voluntariness in entering both pleas is "well nigh irrefutable." *See Perez*, 33 Wn. App. at 262.

Carrier does not establish that withdrawal of his guilty pleas was necessary to correct a manifest injustice. Accordingly, the trial court did not abuse its discretion in denying his motion to withdraw his pleas.

INEFFECTIVE ASSISTANCE OF COUNSEL

Carrier further argues that he received ineffective assistance of counsel when entering his pleas, claiming that his counsel failed to advise him of the sentencing consequences of his plea on count I because there was no "realistic possibility" that the trial court would not impose life without parole. Appellant's Br. at 20.

The test of ineffective assistance of counsel is whether (1) the defense counsel's performance fell below an objective standard of reasonableness and (2) this deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "In the context of a guilty plea, the defendant must show that his counsel failed to 'actually and substantially [assist] his client in deciding whether to plead guilty.'" *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997) (quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (internal quotations omitted)). The defendant must also show that but for counsel's failure to advise him adequately, he would not have pleaded guilty. *McCollum*, 88 Wn. App. at 982. We review an ineffective assistance of counsel claim with a strong presumption that defendant received competent representation. *McCollum*, 88 Wn. App. at 982.

Carrier claims that his defense counsel "failed to inform him [of]and affirmatively misrepresented both the applicable law and consequences of [his] guilty plea to Count I." Appellant's Br. at 22. But the record shows that defense counsel adequately advised Carrier that he could receive a sentence of life imprisonment without the possibility of parole if he pleaded guilty to count I. Defense counsel informed Carrier that there were "some questions to be raised about [his] prior criminal history," but defense counsel never gave Carrier an estimate as to whether he would succeed in arguing that his indecent liberties conviction did not qualify him as

a persistent offender. RP (Feb. 10, 2006) at 57. Carrier told the court he understood he could potentially receive a sentence of life without the possibility of parole if he was not successful in disputing his classification as a persistent offender and, with that understanding, he pleaded guilty to count I. Accordingly, he fails to overcome the presumption that defense counsel provided constitutionally adequate assistance.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.

## OFFICE RECEPTIONIST, CLERK

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Melody M. Crick, WSB No. 35453
(253)798-6629
mcrick@co.pierce.wa.us

Attached is the State's Supplemental Brief